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No. 91-1962

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

UNION MORTGAGE COMPANY, INC.,
Petitioner,

v.

WILLIE MAE BARLOW and WILLIE J. GALY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE REPUBLIC OF FINLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GEORGE A. BERMANN
Counsel of Record
COLUMBIA UNIVERSITY
SCHOOL OF LAW
435 West 116th Street
New York, N.Y. 10027
(212) 854-4258
Attorney for Amicus Curiae, Republic of Finland

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Republic of Finland ("Finland") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case on behalf of Petitioner.*

1. Parties Consenting and Refusing Consent

The consent of the Petitioner has been obtained and has been lodged with the clerk of this Court. The consent of the Respondent was requested but refused.

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* As Respondents received the Petition for Certiorari on June 10, 1992 (Brief of Respondents in Opposition to Petition for a Writ of Certiorari at 10), this motion is timely. Sup. Ct. R. 37.2.

2. Nature of Interest of the Republic of Finland

Finland submits this brief in order to protect its interest in the treatment of its nationals under the Treaty and Protocol of Friendship, Commerce and Consular Rights between the United States of America and Finland of February 13, 1934, 49 Stat. 2659, as modified by the Protocol of Regents of December 4, 1952, 4 U.S.T. 2047 (the "Friendship Treaty"). Finland also submits this brief in support of its interest in having due respect accorded by the United States to public acts of Finland within its territory, in keeping with principles of international comity.

In particular, Finland wishes to express its view that, by failing to accord a Finnish banking institution that has been taken over by the Bank of Finland the same protection from liability for punitive damages that would be accorded to American banking institutions taken over by governmental regulators, the decision below is inconsistent with the United States' obligations under the Friendship Treaty and with basic principles of international comity.

3. Issues Uniquely Addressed by *Amicus* Finland

Finland is in a superior position, relative to the parties, to inform the Court of the potential for the instant case to affect the rights of Finland and of its nationals under the Friendship Treaty. Finland is also in a superior position to argue the appropriate application of principles of comity.

Finland believes that the brief which it is requesting permission to file will contain a more complete argument on the international legal issues than the briefs filed by the parties to the case. These arguments, if accepted, would assist the Court in disposing of the case. Accordingly, Finland's motion should be granted and the attached brief should be considered by the Court in its deliberation on the Petition for Certiorari.

Respectfully submitted,

GEORGE A. BERMANN
Counsel of Record
COLUMBIA UNIVERSITY
SCHOOL OF LAW
435 West 116th Street
New York, N.Y. 10027
(212) 854-4258
Attorney for Amicus Curiae,
Republic of Finland

July 9, 1992

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BRIEF FOR THE REPUBLIC OF FINLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Republic of Finland ("Finland") submits this brief in support of the petition of Union Mortgage Company, Inc. ("Union") for a writ of certiorari in this case.

INTEREST OF THE REPUBLIC OF FINLAND

Finland submits this brief in order to protect its interest in the treatment of its nationals under the Treaty and Protocol of Friendship, Commerce and Consular Rights between the United States of America and Finland of February 13, 1934, 49 Stat. 2659, as modified by the Protocol of Regents of December 4, 1952, 4 U.S.T. 2047 (the "Friendship Treaty"). (Pet. App. 41a.) Finland also submits this brief in support of its interest in having

due respect accorded by the United States to public acts of Finland within its territory, in keeping with principles of international comity.

Finland believes that, by failing to accord a Finnish banking institution that has been taken over by the Bank of Finland the same protection from liability for punitive damages that would be accorded to an American banking institution taken over by the Federal Deposit Insurance Corporation ("FDIC") or the Resolution Trust Corporation ("RTC"), the decision below is inconsistent with the obligations of the United States under the Friendship Treaty and with basic principles of international comity. The impact of the failure to accord protection here is that the burden of the punitive damages awarded by the Alabama courts will be borne by Finnish taxpayers.

In affirming the $6 million punitive damage jury verdict against Union, both the Alabama trial court and the Alabama Supreme Court looked directly past Union to the resources of its parent, Skopbank. (Pet. App. 22a-23a, 38a-39a.)[1] Skopbank is a Finnish banking corporation which serves as the central bank for all of the savings banks of Finland and which has its principal place of business in Helsinki, Finland. Skopbank was taken over

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[1] In considering the economic impact of the punitive award on the defendant, the Alabama Supreme Court quoted with approval the trial court's statement that it

> has considered the economic relationship between Skopbank and its wholly-owned subsidiary Union Mortgage. Skopbank has extended to Union Mortgage an unsecured line of credit totaling $550,000,000.00 dollars through a wholly-owned United States holding company. * * * Based upon the evidence presented at that [*Hammond*] hearing of April 9, 1991, this Court finds that a substantial portion of the $550,000,000 represents a contribution of capital by Skopbank of Helsinki, Finland, to its wholly-owned subsidiary Union Mortgage.

(Pet. App. 39a; *see also* Pet. App. 22a-23a.) In fact, the amount of the credit line and its characterization as a "contribution of capital" were unsupported by the evidence and are inaccurate. (Pet. App. 76a.)

by the Bank of Finland after the award was affirmed by the trial court, but before it was affirmed by the Alabama Supreme Court.

The seizure of Skopbank resulted from a drastic deterioration in its financial condition in 1991. (Pet. App. 46a, 72a-75a.) In order to restore confidence in Skopbank's activities and the Finnish interbank money market, the Bank of Finland, in cooperation with the Finnish Banking Supervision Office, took over majority beneficial ownership and voting control of Skopbank. (Pet. App. 46a, 72a-73a, 91a.) The effect was to place Skopbank in the equivalent of FDIC or RTC conservatorship.[2]

Although Alabama punitive damage review procedures give parties the right to bring new facts bearing on financial hardship to the attention of the appellate court, and Union did so, the Alabama Supreme Court ignored the Bank of Finland's takeover of Skopbank and Union's demonstration that the impact of the award would consequently fall on the Finnish taxpayer.[3]

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[2] On June 15, 1992, the Bank of Finland transferred its ownership interest in Skopbank to the Government Guarantee Fund ("GGF"), a governmental institution, which was created by the Finnish Parliament in March 1992 and whose membership includes representatives from the Parliamentary Supervisory Board, the Ministry of Finance, the Bank of Finland, and the Banking Supervision Office. In general terms, the GGF is similar in nature and function to the FDIC and the RTC. The measures taken by the Bank of Finland from September 1991 were of the same kind that the GGF could have taken had it existed at the time.

[3] Respondents argue that these matters may not be considered on appeal. (Brief of Respondents in Opposition to Petition for a Writ of Certiorari at 3.) This is mistaken, not only for the reasons set forth in the Petition for Certiorari, but also because where, as here, U.S. treaty obligations and principles of comity are implicated, comity itself warrants consideration for the first time on appeal of issues that would otherwise be deemed not to have been raised in timely fashion. *Fortino v. Quasar Co.*, 950 F.2d 389, 391 (7th Cir. 1991) (permitting issues relating to U.S.-Japanese Friendship

At the time of the verdict in this case, Union's net worth was less than the amount of the punitive damage award. (Pet. App. 58a-59a.) As a result of the punitive damages exposure ignited by this verdict, Union effectively ceased operating activities and had a negative net worth as of September 1991. (Pet. App. 68a-69a, 76a, 78a, 90a.) Because Union's exposure to punitive damages far exceeds its net worth and the Finnish Government is not able to identify anyone willing to purchase it, Union is one of the risks which the Finnish Government is likely to have to retain even if the Finnish Government is successful in finding a buyer for a reorganized Skopbank.

Skopbank is by far Union's largest creditor, with a credit line balance of approximately $126 million as of February 1992. (Pet. App. 46a.) Accordingly, Skopbank's resources will be further diminished as the punitive award significantly impairs Union's ability to satisfy this debt. The financial impact will ultimately be felt by the Finnish taxpayers, who already have contributed to fund a massive governmental capital infusion in order to save Skopbank from insolvency. (Pet. App. 46a-47a, 75a-76a.) This added burden on the Finnish taxpayer would not have occurred if the Alabama courts had respected the separate corporate identities of Union and Skopbank or if they had accorded Skopbank the same punitive damage immunity that they would have accorded an American bank taken over by the FDIC or the RTC.

Treaty to be raised for first time on appeal); *cf. Schlesinger v. Councilman*, 420 U.S. 738, 743 (1975) (raising *sua sponte* comity issues between the state and federal governments); *Younger v. Harris*, 401 U.S. 37, 40 (1971) (same).

REASONS FOR GRANTING THE WRIT

The Friendship Treaty between the United States and Finland requires United States courts, state and federal, to afford the same civil and commercial rights and protections to Finnish nationals (including Finnish corporate entities) doing business in the United States as they afford to similarly situated U.S. nationals. By affirming the punitive damages award, not on the basis of the financial resources of Union, but on those of its Finnish parent, Skopbank, the Alabama courts gave Union less favorable treatment than they would have given a domestically-owned company, and thus acted in a manner inconsistent with the obligation of national treatment under the Friendship Treaty.

International comity, recognized as part of American law, was also disserved by the affirmance of a punitive damages award that will effectively be borne by an arm of the Finnish Government that has taken control of a Finnish company—in effect, by the Finnish taxpayer. Such punitive damages are unavailable against the United States government or the State of Alabama or against foreign governments sued directly in United States courts. International comity looks unfavorably on such a result.

I. THE DECISION BELOW IS INCONSISTENT WITH THE PRINCIPLE OF NATIONAL TREATMENT UNDER THE FRIENDSHIP TREATY.

A. The Friendship Treaty Has The Authority Of Federal Law In The Courts Of The United States.

International treaties to which the United States is a party enjoy supremacy under the United States Constitution. U.S. Const. art. VI; *United States v. Pink*, 315 U.S. 203, 231 (1942). Bilateral treaties of friendship, commerce and navigation, of which the Friendship Treaty is an example, have been uniformly interpreted as giving nationals of both parties legally enforceable rights which

must be given effect in U.S. courts.[4] As a class such treaties bind each State party on its territory to accord nationals of the other State party the same level of protection in broadly stated domains as it accords to its own nationals.[5]

This Court has many times emphasized that state law, whether legislative or judicial, should not be allowed to impair the federal foreign relations power or otherwise disturb U.S. relations with foreign states. *E.g., Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968). This is particularly important where a treaty of the United States gives rise to legitimate expectations of protection on the part of a foreign state. *Kolovrat v. Oregon*, 366 U.S. 187, 191-96 (1961); *Zschernig*, 389 U.S. at 443, 451-57 (Harlan, J., concurring).

B. The Friendship Treaty Guarantees Finnish Nationals The Same Treatment In The Conduct Of Their Commercial Activities As Analogous United States Nationals Enjoy.

Article I of the Friendship Treaty provides that the nationals of each party "within the territory of the other shall be permitted * * * to carry on every form of commercial activity * * * upon the same terms as nationals of the state of residence in so far as may be permitted by local law." Among the burdens that Article I specifically guards against, under the principle of na-

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[4] *E.g., Kolovrat v. Oregon*, 366 U.S. 187, 196 (1961); *Spiess v. C. Itoh & Co. Am.*, 643 F.2d 353, 356 (5th Cir. 1981) (interpreting Friendship, Commerce and Navigation Treaty as self-executing); *MacNamara v. Korean Air Lines*, 1987 U.S. Dist. LEXIS 10218, at *3-4, (E.D. Pa. 1987), *rev'd on other grounds*, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

[5] *E.g., Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 186-88 (1982); *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 258-59 (D.C. Cir. 1992); *MacNamara*, 1987 U.S. Dist. LEXIS 10218, at *6-7; *Colonial Bank v. Compagnie Generale Maritime et Financiere*, 645 F. Supp. 1457, 1460 (S.D.N.Y. 1986).

tional treatment, is "the payment of any internal charges * * * other or higher than those that are exacted of and paid by its nationals," and among the general guarantees extended is "the most constant protection and security for * * * property." (Pet. App. 41a-42a.)

Article XVII of the Friendship Treaty underscores that the Treaty's protections extend not only to natural, but also to juridical persons. Nationals of both States are guaranteed rights and privileges "with respect to the organization of and participation in limited liability and other corporations and associations, for pecuniary profit or otherwise." (Pet. App. 43a.) Such entities, if "organized or controlled or participated in by the nationals of either High Contracting Party within the territory of the other," are entitled to all the protections recognized in the territory where they do business. (*Id.*) This is confirmed by Article XVI, which gives "[l]imited liability and other corporations and associations, whether or not for pecuniary profit," the same rights provided they are "organized in accordance with and under the laws * * * of either High Contracting Party and maintain a central office within the territory thereof." (Pet. App. 42a.) Accordingly, under the Treaty, juridical persons, no less than natural persons, are to be regarded as nationals of the contracting parties and are entitled to equal treatment to the extent provided for in Article I.[6]

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[6] Even if Articles XVI and XVII were interpreted as according corporations only most favored nation treatment, the fact that other friendship treaties accord corporations national treatment means that most favored nation treatment *is* national treatment.

C. The Alabama Courts Failed To Accord Finnish Nationals The Equal Treatment To Which They Are Entitled Under The Friendship Treaty.

1. *The Alabama Courts Failed To Respect The Separate Corporate Identities Of A Finnish Corporation And Its U.S. Incorporated Subsidiary Where It Would Have Respected The Separate Existence Of A U.S. Corporation And Its Subsidiary.*

Article XVI of the Friendship Treaty provides that "corporations * * * which have been or may hereafter be organized in accordance with and under the laws * * * of either High Contracting Party * * * shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territory contrary to its laws." (Pet. App. 42a) (emphasis added). Thus, the Treaty itself obligates the courts of the United States to give the same respect to the separate juridical status of Finnish corporations such as Skopbank as to American corporations.[7]

It is well established under the law of Alabama that the corporate form separating an American parent and its subsidiary must be respected, absent a basis for piercing the corporate veil. *E.g.*, *Messick v. Moring*, 514 So. 2d 892, 894-95 (Ala. 1987); *Matrix-Churchill v. Springsteen*, 461 So. 2d 782 (Ala. 1984); *Kwick Set Components, Inc. v. Davidson Indus., Inc.*, 411 So. 2d 134 (Ala. 1982). Similarly, this Court has long recognized the principle that the doctrine of corporate identity must generally be respected. *E.g.*, *Bangor Punta Operations,*

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[7] Even apart from the Friendship Treaty, United States law requires that respect for separate corporate identity be shown to foreign state-owned corporations. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983) [hereinafter "*Bancec*"] ("government instrumentalities established as juridicial entities distinct and independent from their sovereign normally should be treated as such").

Inc. v. Bangor & Aroostook R. Co., 417 U.S. 703, 713 (1974); *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939). Had the punitive award been assessed against a subsidiary of a U.S. corporation, the financial resources of the parent could not have been considered without first establishing a basis for doing so by traditional alter ego analysis.[8]

The obligation to respect corporate identity was not honored here. As shown above, the Alabama trial court and the Alabama Supreme Court disregarded the separate juridical status of Union and Skopbank when they affirmed the $6 million punitive award based upon the financial resources of Skopbank.[9] In so doing, the courts did not even attempt to justify this unwarranted veil-piercing. By failing to give a Finnish Corporation and its U.S. subsidiary the benefit of this protection, the Alabama courts acted in a manner inconsistent with both Article XVI and the equal treatment obligation embodied in the Friendship Treaty, as well as with "principles of comity between nations" (further discussed below). *Bancec*, 462 U.S. at 626-27.[10]

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[8] *E.g., Gearhart v. Uniden Corp. of Am.*, 781 F.2d 147, 153 (8th Cir. 1986); *Herman v. Hess Oil V.I. Corp.*, 379 F. Supp. 1268, 1276-77 (D. St. Croix, 1974); *HCA Health Servs. v. National Bank of Commerce*, 745 S.W.2d 120, 123-24 (Ark. 1988); *Miller Brewing Co. v. Best Beers of Bloomington*, 579 N.E.2d 626, 641-42 (Ind. App. 1991).

[9] Indeed, Skopbank had not yet acquired Union at the time the events underlying this cause of action took place. (Pet. App. 46a.)

[10] The Alabama courts compounded the error of looking past Union to Skopbank by their failure, in so doing, to take account of Skopbank's actual financial distress. Such distress was manifest both at the time of the trial court's affirmance and even more so at the time of the Alabama Supreme Court's affirmance, at which point Skopbank's financial condition had deteriorated to such an extent that it was in the Finnish equivalent of FDIC or RTC conservatorship.

2. *The Alabama Courts Failed To Accord A Finnish Entity The Same Protection From Punitive Damages To Which A U.S. Entity Would Be Entitled Under Like Circumstances.*

It is well established under United States law that the assessment of punitive damages is improper when their burden will effectively be borne by innocent third parties whose "punishment" will serve neither the retributive nor deterrent purposes that punitive damages are supposed to serve. Thus, the Alabama Supreme Court held in *Resolution Trust Corp. v. Mooney*, 592 So. 2d 186 (1991), under highly analogous circumstances, that an award of punitive damages may not be entered against a domestic company taken over by the RTC, because the burden of such damages would necessarily fall on creditors who are not responsible for the wrongdoing and who are not appropriate targets of punishment or deterrence. *Id.* at 190; *accord Matter of GAC Corp.*, 681 F.2d 1295, 1301 (11th Cir. 1982) (punitive damages may not be awarded against a company in a Chapter X reorganization proceeding since "the effect of allowing a punitive damages claim would be to force innocent creditors to pay for the bankrupt's wrongdoing"); *Lanz v. Resolution Trust Corp.*, 764 F. Supp. 176, 178 (S.D. Fla. 1991) ("punitive * * * damages cannot be recovered against FSLIC as conservator").

The same general principle was given powerful expression by this Court in a somewhat different context in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). There, this Court held that the Civil Rights Act, 42 U.S.C. § 1983 (1988), could not properly be interpreted as authorizing the award of punitive damages against a municipality for civil rights violations committed by its employees. The Court found that imposing liability on a public entity based solely upon the wrongful conduct of its employees does not substantially further either the retributive or deterrent aims of punitive damages and thus could not be justified:

> Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

City of Newport, 453 U.S. at 267.

Because Union has a negative net worth, and Skopbank is Union's parent and largest creditor, the award here effectively imposes punitive damages liability initially on Skopbank. However, because Skopbank has been taken over by an arm of the Finnish Government, ultimately the Finnish taxpayers will bear the burden of the punitive award. Such a result advances neither the retributive nor the deterrent objective of punitive damages. Agencies of the United States would be spared punitive damages liability in like circumstances. National treatment accordingly calls for giving Finnish corporate and governmental entities the same consideration.

Moreover, United States Supreme Court precedent and Alabama law require that, in their review of a punitive damages verdict, the Alabama courts at least *consider* the impact of the award on innocent third parties. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991); *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (1986). Since a U.S.-owned entity would at a minimum be entitled to have the impact of the punitive award upon innocent third parties considered by a reviewing court under these circumstances, the refusal of the Alabama courts to accord even this minimum procedural safeguard to a Finnish-owned entity is also inconsistent with the obligation of national treatment.

D. Union May Raise The Issue Of Unequal Treatment Under The Friendship Treaty.

Among the rights accorded to Finnish nationals under the Friendship Treaty is the right under Article XVII to

"the organization of and participation in limited liability and other corporations and associations for pecuniary profit or otherwise." (Pet. App. 43a.) Once a Finnish national establishes such a local corporation under Article XVII of the Friendship Treaty, the obligation of national treatment contained in Article I requires that the local subsidiary be "considered for purposes of the Treaty to be [a] compan[y] of the country in which [it is] incorporated; [it is] entitled to the rights, and subject to the responsibilities of other domestic corporations." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 188 (1982).

In *Sumitomo*, this Court refused to allow the U.S.-Japanese Friendship Treaty to be used to give the American subsidiary of a Japanese company an immunity from federal employment laws to which American companies are not entitled. Such preferential and unequal status would have offended the cardinal principle of "national treatment" which lies at the heart of treaties of friendship. The same principle of equal treatment that made the subsidiary in *Sumitomo* subject to Title VII should operate here to secure for Union the same protections that a similarly situated American company would enjoy.[11]

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[11] This court accords "great weight" to treaty interpretations which have been agreed to by both parties. *Sumitomo*, 457 U.S. at 185; *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). In its submission to this Court in *Sumitomo*, the United States took the same position with respect to the rights of foreign-owned subsidiaries under the U.S.-Japanese Friendship Treaty that Finland takes with respect to the Friendship Treaty here:

> [The Treaty] ensures "national treatment" for Japan-controlled companies incorporated in the United States—i.e., it places them on an equal footing with American-controlled corporations in the United States * * * [T]he national treatment provided by the Treaty furnishes appropriate assurance against discriminatory measures directed at the foreign-owned company that could adversely affect the favorable investment climate the Treaty was intended to create.

Brief for United States as *amicus curiae* at 13-14, *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).

Later cases confirm that friendship treaties would be violated if a domestic subsidiary were "treated * * * differently under [U.S. law] solely because it is a wholly owned subsidiary of a foreign corporation." *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 258 (D.C. Cir. 1992); *accord MacNamara v. Korean Airlines*, 1987 U.S. Dist. LEXIS 10218, at *6-7 (E.D. Pa. 1987), *rev'd on other grounds*, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

Union can also raise Skopbank's equal treatment rights under the doctrine of *jus tertii* standing. That doctrine permits a party to assert the rights of a third person if (1) "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue," and (2) there is "some genuine obstacle" to the third person's assertion of his own right. *Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976); *accord Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *Craig v. Boren*, 429 U.S. 190, 195-96 (1976).

Here, the relationship between Skopbank and Union is such that Union "is fully, or very nearly, as effective a proponent" of the right to equal treatment as Skopbank. *Singleton*, 428 U.S. at 115. Moreover, as Skopbank's rights were not violated until the Alabama courts affirmed the jury's verdict, and as Skopbank is not and never was a party in this case, Skopbank is not able to assert its own rights. Accordingly, Union has *jus tertii* standing to assert Skopbank's rights under the Friendship Treaty. *See Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991) ("subsidiary [may] assert any of its parent's [friendship] treaty rights * * * to the extent necessary to prevent the treaty from being set at naught").

II. THE DECISION BELOW IS INCONSISTENT WITH PRINCIPLES OF INTERNATIONAL COMITY.

A. Principles Of International Comity Require United States Courts To Show Proper Consideration For The Legitimate Interests Of Foreign Governments.

International comity has long played a critical role in litigation in U.S. courts that implicates the legitimate interests of foreign states. This Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).[12]

Comity is not confined to cases in which a foreign sovereign is a party (as under the doctrine of sovereign immunity) or in which the validity of an act of a foreign sovereign on its own soil is directly called into question (as under the act of state doctrine).[13] On the contrary, this Court and lower federal courts have applied the doctrine of comity to a broad range of purely private litigation whenever respect for the fundamental interests of a foreign sovereign require them to do so.[14]

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[12] *Accord Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) ("Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect."); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984).

[13] *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (sovereign immunity); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (act of state).

[14] *E.g., Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987) (refusal to assert personal jurisdiction over aliens); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (application of forum non conveniens in deference to foreign forum); *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972) (respect for choice of non-U.S. forum); *Zschernig v. Miller*, 389 U.S. 429 (1968) (non-

This Court recently set out its analysis for applying comity in the context of deciding whether resort to the Hague Evidence Convention is required in obtaining evidence located abroad for use in U.S. judicial proceedings. In *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987), both the five-member majority and the four-member minority agreed that comity dictated the answer. The majority favored a case by case application of comity in which courts consider the totality of the circumstances through a "particularized analysis of the respective interests of the [two nations.]" 482 U.S. at 543-44. The minority, in its partial concurrence, went even further, concluding that comity required an analysis of "the foreign interests, the interests of the United States, and the mutual interests * * * in a smoothly functioning international legal regime," and that this analysis dictated a general rule favoring exclusive use of the Hague Convention. 482 U.S. at 555 (Blackmun, J., concurring).

Both approaches taken in *Aérospatiale* are consistent with the framework of comity analysis provided for by the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987) and the various factors cited there.[15] *See*

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enforceability of reciprocity requirements imposed by state law against foreign governments); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 381-84 (1958) (application of foreign law where foreign nation's interests are significantly implicated); *Hilton v. Guyot*, 159 U.S. 113 (1895) (recognition and enforcement of foreign judgments); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992) (refusal to enjoin foreign judicial proceedings); *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680 (7th Cir. 1987) (stay of U.S. proceedings in deference to foreign proceedings).

[15] Section 403(2) requires courts, in deciding whether to apply local law to a person or activity having connections with a foreign state, to consider among other things:

> (c) the character of the activity to be regulated, the importance of the regulation to the regulatory state * * * and the degree to which the desirability of such regulation is generally accepted;

also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comment d (1971).

B. International Comity Counsels That U.S. Courts Not Impose Punitive Damages Under Circumstances In Which A Foreign State And Its Citizens Will Bear The Burden And In Which No Compelling Interest Of The United States Or Its Citizens Will Be Served.

Under any application of international comity, it is appropriate to balance the strength of a foreign government's interest in receiving a particular form of consideration against the competing interests of the private parties in obtaining, and the United States in according, treatment unaffected by the needs of comity. Such a balancing here weighs heavily in favor of showing deference to the acts of institutions of the Finnish Government in respect of the takeover of Skopbank:

1. The Finnish Government maintains a strong interest in the application of comity in this case. First, it has an interest in protecting its taxpayers and the financial soundness of its banking system from ruinous financial liabilities in the form of punitive damages.

Second, application of international comity is called for to protect Finland's substantial interest in the integrity of its reorganization law. As early as 1883, this Court ruled that a New York action to recover on the bonds of a Canadian railroad company undergoing

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(d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

Section 403(3) further counsels that "a state should defer to the other state if that state's interest is clearly greater."

reorganization in Canada was barred by the pendency of the Canadian proceedings:

> Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the [reorganization] scheme may fail. All home creditors can be bound by the arrangement. What is needed is to bind those who are abroad. * * * *[T]he true spirit of international comity requires that schemes of this character * * * should be recognized in other countries.*

Canada S. Ry. v. Gebhard, 109 U.S. 527, 639 (1883) (emphasis added).[16]

2. At the same time, depriving a United States plaintiff of punitive damages cannot be regarded as a significant hardship, whether viewed as a general proposition or in the specific context of this case. Punitive damages are by definition not compensatory in nature. In other words, they are not required in order to make a tort victim "whole." They represent a windfall. As this Court acknowledged in *City of Newport*, "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious and to deter him and others from similar extreme conduct." 453 U.S. at 266-67.

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[16] A long line of cases establishes that under comity, U.S. courts owe deference to the overriding interest of foreign states in their conduct of conservatorship and like proceedings. *See, e.g., In re Goerg*, 844 F.2d 1562, 1568 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989); *Cunard S.S. Co. v. Salem Reefer Servs. AB*, 773 F.2d 452, 456 (2d Cir. 1985); *Cornfeld v. Investors Overseas Servs., Ltd.*, 471 F. Supp. 1255, 1260, 1262 (S.D.N.Y.), *aff'd without opinion*, 614 F.2d 1286 (2d Cir. 1979) (citing "the public interest in * * * international cooperation" and "principles of international comity"). The Bankruptcy Reform Act of 1978, 11 U.S.C. § 304(c) (1988), also cites "comity" as a factor in a court's decision whether to enjoin or stay an action against a debtor respecting property involved in a foreign proceeding.

3. Although Alabama may have a general retributive and preventive interest in punitive damage awards, that interest is necessarily diminished, if not wholly extinguished, when the party ultimately bearing the burden of the award is not at fault.

4. The mutual interest of all nations in reciprocity, commerce, and the smooth functioning of the international regime likewise militate heavily in favor of applying comity principles to this case.

First, the United States has clearly evinced in its own Federal Tort Claims Act a hostility to the recovery of punitive damages in tort claims against the government or its instrumentalities. 28 U.S.C. § 2674 (1988). This statutory waiver of sovereign immunity in tort expressly precludes the award of punitive damages in government tort cases.

Similarly, the State of Alabama has statutorily waived its immunity in tort, but expressly reserved for itself, its counties and its municipalities virtually complete immunity from the imposition of punitive damages. Ala. Code § 6-11-26 (Supp. 1991).

The attitudes of Congress and the States forbidding punitive damages against governmental entities are a strong indication of the consideration that courts in the United States properly owe a sovereign foreign government under like circumstances. The spirit of mutuality underlying the comity doctrine supports according a foreign government the same degree of protection against punitive damages that the United States and the State of Alabama claim for themselves.

Second, international law and practice counsel strongly against the imposition of punitive damages where their impact will fall upon a foreign state and its taxpayers. Indeed, with the possible exception of international crimes such as genocide, slavery and torture, principles of cus-

tomary international law prohibit the imposition of punitive damages against a foreign state.[17]

Under the U.S. Foreign Sovereign Immunities Act, foreign states and their political subdivisions are categorically shielded, insofar as they may be defendants in federal or state court, from exposure to punitive damages in tort. 28 U.S.C. § 1606 (1988). Similarly, the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) has been uniformly interpreted as prohibiting the award of punitive damages.[18] International comity suggests that the same policy be extended to cases in which a foreign government, though not a named defendant, will as a practical matter bear the burden of a punitive award.

Finally, punitive damages are an institution that is, to put the matter simply, alien to most foreign legal systems, including the Finnish one. XI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, Ch. 8, § 124 (A. Tunc, ed., 1986). A fundamental notion in most civil law and civil law-influenced systems is that tort and criminal law form distinctive legal domains, and that the compensatory purposes of the former and the retributive and deterrent purposes of the latter should not be confused. Accordingly, the only recoverable damages in tort cases, indeed in all categories of cases, are compensatory in

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[17] *Velasquez Rodriquez Case*, Inter-American Court of Human Rights, Decision on Compensation (Ser. C) (July 21, 1989); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 901 Reporter's Note 5 (1987); E. Riedel, *Damages*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 71 (1987); 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1215 (1967).

[18] *E.g.*, *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991); *In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991); *Floyd v. Eastern Airlines*, 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991).

character. E. Aurejarvi, *General Principles of the Law of Obligations*, in THE FINNISH LEGAL SYSTEM, 134-36 (J. Uotila, ed., 2d ed., 1985). The singular character of punitive damages from the foreign perspective supports application of comity principles, particularly when a foreign government is their effective target.

Thus, all considerations relevant to the traditional application of international comity in U.S. courts—most notably the strength of Finland's interest in the integrity of its banking system and reorganization law and in the protection of its taxpayers, the insignificance of the U.S. interests, and the absence of hardship to the Respondents —support review by this Court of the affirmance of the punitive damages award in this case.

CONCLUSION

For the reasons stated above, the Republic of Finland supports the petition for a writ of certiorari.

Respectfully submitted,

GEORGE A. BERMANN
Counsel of Record
COLUMBIA UNIVERSITY
SCHOOL OF LAW
435 West 116th Street
New York, N.Y. 10027
(212) 854-4258
Attorney for Amicus Curiae,
Republic of Finland

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